No. 87-713

IN THE

Supreme Court of the United States

October Term, 1987

SLAVKO ANDRIJEVIC, a/k/a AL ANDRIE,
Petitioner,

vs.

C. RUSSELL KELLERAN, JR.,
EIGHTEEN MILE CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD F. GRIFFIN
MOOT & SPRAGUE
2300 Main Place Tower
Buffalo, New York 14202
(716) 845-5200
Attorneys for Respondents

Of Counsel:
MATTHEW J. JASEN
MARILYN A. HOCHFIELD

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Question Presented

Did the Court of Appeals for the Second Circuit err in concluding that a bankruptcy court may not disregard the preclusive effect of a state court default judgment of liability where the judgment was obtained by a creditor without fraud or collusion and the rendering court had jurisdiction over the parties and the subject matter?

Statement of Parent, Subsidiary and Affiliated Corporations Pursuant to Rule 28.1 of the Supreme Court of the United States

Respondent Eighteen Mile Corporation does not have any parent, subsidiary or affiliated corporations.

TABLE OF CONTENTS.

Page

TABLE OF AUTHORITIES.

Cases:

Statutes:

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-713

SLAVKO ANDRIJEVIC, a/k/a AL ANDRIE,
Petitioner,

vs.

C. RUSSELL KELLERAN, JR.,
EIGHTEEN MILE CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Second Circuit in this case. The Court of Appeals, in an opinion reported at 825 F.2d 692 (1987), correctly determined, in a manner consistent with applicable decisions of this Court, that in the context of this case the bankruptcy court was bound by the federal full faith and credit statute, 28 U.S.C. §1738, to give preclusive effect to a state court default judgment of liability to the same extent as would the courts of the state from which the judgment was taken.

I. Statement of the Case

Respondents set forth the salient facts of this case in order to correct several inaccuracies and omissions in the Petition for a Writ of Certiorari.[1]

In early 1976 Petitioner Andrijevic and Respondent Kelleran formed Respondent Eighteen Mile Corporation for the purpose of buying, developing and selling land. In 1980, Andrijevic and Kelleran decided to wind up the affairs of Eighteen Mile Corporation, and various steps were taken to liquidate the corporation.

A. The State Court Proceedings

Following a deterioration in the relationship of Andrijevic and Kelleran, Andrijevic, on April 14, 1981, filed a mechanic's lien on certain real property owned by Eighteen Mile Corporation for claimed unpaid wages and materials allegedly furnished in connection with construction on the subject property. The following year Andrijevic commenced an action in New York State Supreme Court for the County of Erie against Eighteen Mile Corporation and other defendants to foreclose on the lien.

Eighteen Mile interposed an answer and counterclaimed against Andrijevic for (1) willful exaggeration of a lien and (2) breach of contract for failure to complete construction of a house on the subject property. Andrijevic then defaulted by failing to reply to Eighteen Mile's counterclaims. (Eighteen Mile's answer and counterclaims are included in the Appendix herein.)

[1] This statement of facts is drawn from the opinions below, which are included in the Appendices of the Petition for Writ of Certiorari, from the Appendix of this Brief in Opposition and from the transcript of proceedings in the Bankruptcy Court.

More than a year later, after a series of motions and cross-motions made and contested by all parties, in an opinion dated August 8, 1983, the state court held that Andrijevic was not entitled to his lien, granted Eighteen Mile summary judgment dismissing Andrijevic's complaint and denied Andrijevic's cross-motion to be relieved from his default in answering Eighteen Mile's counterclaims (Pet., 93A-98A). Four months later, in an opinion dated December 14, 1983, the New York Supreme Court granted a default judgment in favor of Eighteen Mile with respect to its counterclaims as to liability of Andrijevic for breach of contract and willful exaggeration of a mechanic's lien and directed an inquest on damages (Pet., 91A-92A). Judgment was entered on January 5, 1984, and the damages inquest was scheduled for February 23, 1984 (Pet., 87A-90A).

Andrijevic never appealed the judgment dismissing his complaint nor the order denying his motion to vacate his default on the counterclaims. Instead, before the damages inquest could take place, on February 8, 1984 he filed a petition in the United States Bankruptcy Court for the Western District of New York seeking relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C. §1301 *et seq.*, which automatically stayed the damages inquest.

B. The Proceedings in Bankruptcy Court

Eighteen Mile filed proof of its claims in the bankruptcy court for willful exaggeration of a mechanic's lien and breach of contract based on the state court judgment.[2] Andrijevic moved under Section 502 of the

[2] Kelleran also filed a proof of claim against Andrijevic for unpaid legal fees and disbursements, for which he had commenced a separate action in state court; that action was stayed by the bankruptcy filing, and thus never reduced to judgment. The disallowance of that claim is not at issue in the Petition for Writ of Certiorari.

Bankruptcy Code to disallow the claims, and after a hearing, the bankruptcy court granted the bankrupt's motion and disallowed both claims.

In doing so, the bankruptcy court made findings directly contrary to the prior judgments of the state court.

The state court had granted Eighteen Mile summary judgment dismissing Andrijevic's complaint to foreclose on the mechanic's lien only after contested proceedings in which the court had examined the merits of the claim, as it was obligated to do. Similarly, before denying Andrijevic's cross-motion for relief from his default on the counterclaims for breach of contract and willful exaggeration of the mechanic's lien and entering judgment on the counterclaims, the state court had considered both his claim of excusable neglect to reply to the counterclaims and the merits of Andrijevic's proposed defense (which was the same as the allegations of his complaint, *i.e.*, that pursuant to an oral agreement, he was entitled to weekly wages from Eighteen Mile and not having been paid, he was entitled to stop work and to file a mechanic's lien).[3]

After considering Andrijevic's extended affidavits denying that his lien was exaggerated and hearing oral argument by Andrijevic's attorney, the state court had made the following written findings, among others:

> Despite the fact that he owned one-half of the stock in 18 Mile at the time the Company decided to complete the home, . . . he contends that there was a separate agreement, apparently oral, for the Corporation to pay him a weekly salary to finish

[3] In New York practice, a motion to vacate a default generally requires (1) an excuse for the default and (2) an affidavit of merits of the claim or the defense. *See* N.Y. Civil Practice Law & Rules §§317, 5015(a)(1) and 3216(e); Siegel, *N.Y. Practice*, §427, pp. 567-568 (1978).

> construction. Although he never collected this weekly paycheck, he continued his endeavors for some twenty-three (23) weeks.
>
> . . .
>
> Under all the circumstances, I find the plaintiff's affidavits inconclusive and unsatisfactory.

(Pet., 95A-96A, 98A).

The relitigation of these factual issues in the bankruptcy court produced entirely different findings. The bankruptcy court found, *inter alia*, that "the arrangement was that the debtor [Andrijevic] would hire and supervise subcontractors in return for Eighteen Mile paying him on a weekly basis" (Pet., 70A); "Kelleran failed to abide by his obligation to pay the debtor for his construction services on a regular basis" (Pet., 72A); and "the debtor [Andrijevic] had a valid claim for wages against this creditor [Eighteen Mile] and every right to a mechanic's lien" (Pet., 81A).

Thus, though the state court judgment found Andrijevic liable for breach of contract and willful exaggeration of a lien, the bankruptcy court found instead that Andrijevic did not breach his agreement with Eighteen Mile and did not willfully exaggerate the lien.

In making these findings, the bankruptcy court held that it had the authority to look behind the state court judgment, disregard its *res judicata* effect and relitigate the issues on grounds that "that judgment is based upon a default and only finds liability; the damage inquest had not yet been held as of the date of the debtor's bankruptcy petition. . . ." (Pet., 73A). Further, the court held as a general matter: "For purposes of determining the allowability of claims, a bankruptcy court may look behind a State Court judgment. In so doing, it is this Court's finding that the claim of willful exaggeration . . . is wholly without merit" (Pet., 81A-82A).

C. The District Court Decision

The United States District Court for the Western District of New York affirmed the decision of the bankruptcy court, finding that it did not commit error in failing to give *res judicata* effect to the state court judgment, "... because the state court judgment involved in this case was a default judgment and involved claims which the bankruptcy court found incredible given its findings of the facts of this case ...." (Pet., 55A). It relied on *Margolis v. Nazareth Fair Grounds & Farmers Market*, 249 F.2d 221 (2d Cir. 1957) as standing for the proposition that a bankruptcy court has broad equitable powers to re-examine a prior judgment and to disregard it if "equitable considerations" warrant a contrary outcome.

D. The Decision of the Court of Appeals

The Court of Appeals for the Second Circuit reversed. Writing for the panel's majority, Circuit Judge Meskill stated that the federal full faith and credit statute, 28 U.S.C. §1738, required the bankruptcy court to give preclusive effect to the default liability judgment obtained in the state court by Eighteen Mile to the same extent as would a New York court, unless an exception existed to prevent operation of the judgment's preclusive effect. *Kelleran v. Andrijevic*, 825 F.2d 692, 694 (2d Cir. 1987).

Turning first to a consideration of state preclusion law, the Court determined that in New York, "when a party defaults by failure to answer and the court orders an inquest as to damages, the defaulting litigant may not further contest the liability issues." *Id.* Therefore, the bankruptcy court was bound to the determination of

liability in the state judgment unless an exception existed to justify preventing the operation of its *res judicata* effect.

Relying on this Court's decision in *Heiser v. Woodruff*, 327 U.S. 726, 736 (1946) and its own earlier decision in *Margolis, supra*, 249 F.2d at 223-25, the Court of Appeals held that bankruptcy courts may look beyond a state court default judgment where the judgment was procured by collusion or fraud or where the rendering court lacked jurisdiction over the subject matter or the parties.

Because these exceptions did not apply in the instant case—indeed Andrijevic *conceded* that they did not—the courts below had erred in permitting the bankruptcy proceedings to be used to relitigate issues already resolved in a court of competent jurisdiction.

However, the Court also held that the state court judgment, having spoken only to liability, did not bar litigation of the damages issues in bankruptcy court. Thus in reversing the judgment below, the Court of Appeals instructed the district court to remand the matter to the bankruptcy court for a rehearing on damages, giving *res judicata* effect only to the liability judgment of the state court.

II. Summary of Argument

The Court of Appeals for the Second Circuit correctly concluded that the bankruptcy court was bound to give preclusive effect to the state court default judgment on the issue of liability and could not re-examine those issues already resolved in a court of competent jurisdiction, given the absence of any fraud or collusion in procuring the judgment.

The application of this well-established rule has not altered the landscape of bankruptcy jurisprudence, and does not furnish this Court the occasion for the kind of judicial mapping of the terrain as to the equitable powers of a bankruptcy court under 11 U.S.C. §§502 and 105(a) in relation to the federal full faith and credit statute, 28 U.S.C. §1738, that Petitioner seeks in his petition.

There is no confusion in the law and no new issues are raised in this case that would warrant the granting of Petitioner's application unless the Court is prepared to say that the Bankruptcy Code of 1978, *sub silentio*, nullified the federal full faith and credit statute and placed no constraints on what issues could be tested under the bankruptcy law. Certiorari would be particularly inappropriate in light of the Second Circuit's direction to remand this case to the bankruptcy court to pass upon the unresolved damage aspect of Respondent's claims.

III. Argument

The legal principles which govern the decision reached by the court below have been well established by this Court. In *Heiser v. Woodruff*, 327 U.S. 726 (1946), as in the instant case, the creditor had obtained a default judgment against the debtor, and the debtor's motion to vacate the judgment, prior to bankruptcy, had been denied. This Court rejected the reasoning of the Tenth Circuit that a court of bankruptcy, in passing on whether to allow the claim, had the equitable power to disregard principles of *res judicata* and to decide whether the cause of action on which the default judgment was entered was meritorious. Noting that *Pepper v. Litton*, 308 U.S. 295 (1939), upon which the Tenth Circuit had relied, lent no support to such a broad reading of a bankruptcy court's equitable powers, this Court held:

> Undoubtedly, since the Bankruptcy Act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud of a party .... But it is quite another matter to say that the bankruptcy court may reexamine the issues determined by the judgment itself. It has, from an early date, been held to the contrary. [citing cases].

327 U.S. at 736.

In *Heiser*, since the default judgment was found not to have been procured by any fraud perpetrated on the judgment debtor, this Court held that it was *res judicata* as to issues decided by it and could not be relitigated in bankruptcy court.

Contrary to this longstanding rule, the bankruptcy court in the instant case examined into and redetermined the merits of the very claims upon which the state court had rendered its liability judgment in favor of Respondent, after two contested hearings in which Andrijevic had sought unsuccessfully to vacate his default, despite the fact that Petitioner conceded that there was neither fraud nor collusion in procuring the judgment. The Second Circuit properly determined that the courts below had erred in failing to give that liability judgment preclusive effect.

Nothing in the relevant decisions of this Court since *Heiser* requires a different result in this case. Petitioner cites *Brown v. Felsen*, 442 U.S. 127 (1979) in questioning the continuing vitality of the applicability of principles of *res judicata* in bankruptcy cases.

However, this Court in *Brown v. Felsen* expressly limited its holding to issues regarding dischargeability of a debt, stating:

> [W]e reject respondent's contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings *when considering the dischargeability of respondent's debt.* (Emphasis added.)

Id., at 138-39.

The present case does not involve questions regarding dischargeability of a debt; thus *Brown* is not applicable. Further, *Brown* states no new principle of law on the question of the application of *res judicata* in bankruptcy. Indeed, in *Heiser v. Woodruff*, 327 U.S. at 740, n., the Court noted:

> Cases on which respondents rely . . . as illustrating the extent to which a court may look behind a judgment proved in bankruptcy to ascertain the

> nature of a claim upon which the judgment is based, are concerned exclusively with the question of the nature of the liability represented by the judgment, that is, whether it represents a "debt" provable and dischargeable in bankruptcy under §§17 and 63 of the Bankruptcy Act. . . . Those cases do not support the ruling of the Court of Appeals below that the bankruptcy court, in determining the validity of a provable claim upon a judgment, may reexamine the issues which were litigated by the bankrupt . . . in the suit in which the judgment was rendered or in any other. . . .

Finally, in *Brown* itself this Court was careful to make a similar distinction, when it stated:

> Respondent's res judicata claim is unlike those customarily entertained by the courts. . . .
>
> Here, . . . *petitioner readily concedes that the prior decree was binding*. . . . He does not assert a new ground for recovery, *nor does he attack the validity of the prior judgment.* (Emphasis added.)

442 U.S. at 132-33.

This Court's recent decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ___ U.S. ___, 105 S. Ct. 1327 (1985) in no way undermines the decision of the Second Circuit in this case. *Marrese* held that the federal full faith and credit statute, 28 U.S.C. §1738, required that a federal court first consider the state law of claim preclusion before determining whether a state court judgment would have a preclusive effect in a subsequent federal proceeding on a claim or issue within the exclusive jurisdiction of the federal courts. In *Marrese*, that involved an antitrust claim.

Marrese is inapplicable to the instant case. The state court default judgment on liability concerned only claims under state law for breach of contract and willful exaggeration of a lien, not some new claim within the

exclusive jurisdiction of the federal courts. Nothing in *Marrese* suggests that the bankruptcy court, pursuant to 11 U.S.C. §502, had broad equity power to attack the validity of the state court judgment as to those claims.

Nor does anything in *Marrese* or in the language or legislative history of the Bankruptcy Code justify Petitioner's tortured conclusion that Congress, in enacting Section 105(a) of the Code,[4] worked an implicit repeal of the federal full faith and credit statute, by giving broad equitable powers to a bankruptcy court to redetermine the merits of state court judgments. As the Fifth Circuit has recognized:

> . . . Section 105(a) simply authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code. The Section is described in the legislative history as being "similar in effect to the All Writs Statute." Thus, it authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction.
>
> . . . That statute does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.

United States v. Sutton, 786 F.2d 1305, 1307-8 (5th Cir. 1986) (footnotes omitted). *See*, also, *In re Alston*, 49 B.R. 929, 933 (B'cy E.D.N.Y. 1985) (equitable powers conferred upon bankruptcy court by 11 U.S.C. §105 are broad, but §105 does not give bankruptcy court authority to contravene well-established principle of *res judicata*, which bars relitigation and requires that prior final state court judgment, even in the case of a default judgment, be given full faith and credit).

---

[4] That section provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Consistent with *Marrese*, the Second Circuit in the instant case did consider state preclusion law and gave the default judgment at issue the same preclusive effect in the bankruptcy proceedings as the state courts themselves would give it, *i.e.*, the issue of liability could no longer be contested. For purposes of New York State preclusion law, when a default judgment is taken on the issue of liability, that issue is considered actually litigated and determined on the merits. It is as conclusive an adjudication between the parties of whatever is essential to support the judgment as one entered after an answer and contest. The *liability issue* may not be relitigated in a damages inquest under state preclusion law. *See, e.g., Metropolitan Property & Liability Ins. v. Cassidy*, 127 Misc. 2d 641, 486 N.Y.S.2d 843, 847 (Sup. Ct. Duchess County 1985). Therefore, the Court below properly held that the question of Andrijevic's liability on those state law claims could not be relitigated in the bankruptcy court, absent fraud or collusion in the procurement of the judgment, which concededly were not present.

However, since the issue of damages had not been resolved in the state court, the Second Circuit in remanding this case to the bankruptcy court did not impose any limitation on that court's authority to exercise its equitable powers in determining what damages, if any, should be allowed Respondent on his counterclaims. Rather, the Court of Appeals specifically stated that upon remand the bankruptcy court, not the state court, would pass on the unresolved damage aspect of Respondent's claims in bankruptcy, notwithstanding the state court's judgment on the question of liability. 825 F.2d at 695-96.

To be sure, the Second Circuit did not restrict in any way the bankruptcy court's broad equitable powers to grant priority to or subordinate Respondent's claims after adjudicating the question of damages, should equitable considerations so dictate.

All that the Second Circuit holding stands for is that a state judgment, properly rendered in a court of competent jurisdiction prior to filing for bankruptcy, is entitled, in the absence of fraud or collusion, to be given full faith and credit in the bankruptcy court, and in particular, that the issue of liability resolved by the state court in this case is *res judicata* in bankruptcy.

IV. Conclusion

There is no special significance to the decision of the Court of Appeals in this case which warrants certiorari. The court below correctly applied the decisions of this Court to the case before it. The petition for certiorari should thus be denied.

Dated: Buffalo, New York
November 30, 1987

Respectfully submitted,

RICHARD F. GRIFFIN
MOOT & SPRAGUE
2300 Main Place Tower
Buffalo, New York 14202
(716) 845-5200
Attorneys for Respondents

Of Counsel:
MATTHEW J. JASEN
MARILYN A. HOCHFIELD

RESPONDENT'S APPENDIX

Answer and Counterclaim of Respondent Eighteen Mile Corporation dated June 7, 1982

STATE OF NEW YORK
SUPREME COURT—County of Erie

SLAVKO ANDRIJEVIC
95 Miller Avenue
Blasdell, New York 14219,

Plaintiff,

vs.

EIGHTEEN MILE CORPORATION
1314 Liberty Bank Building
Buffalo, New York 14202;
VLADO CAROVSKI
191 Harrison Street
Blasdell, New York 14219;
LEO SWITALA
4405 Mile Strip Road
Blasdell, New York 14219;
WAYNE PENSENSTADLER
59 Woodview Avenue
Hamburg, New York 14075;
BOISE CASCADE CORPORATION
Manufacturing House Division
c/o CT Corporation System
277 Park Avenue
New York, New York 10017; and
SCHREIBER & WINKELMAN, INC.
East Eden Road
Eden, New York,

Defendants.

Respondent's Appendix—Answer and Counterclaim of Respondent Eighteen Mile Corporation dated June 7, 1982.

ANSWER & COUNTERCLAIM

Subject Premises:
4639 Kingswood Lane
Hamburg, New York

Defendant, EIGHTEEN MILE CORPORATION, by its attorney, C. RUSSELL KELLERAN, JR., for its Answer to the plaintiff's Complaint and for its Counterclaims herein:

FIRST: ADMITS the allegations contained in paragraphs "2", "6", "13" and so much of "12" as alleges docketing of notice of lien on April 14, 1981, in the Erie County Clerk's Office.

SECOND: DENIES having knowledge or information sufficient to from a belief as to the truth or falsity of the statements contained in paragraphs "1", "3", "4", "5", "11", "14" and "15".

THIRD: DENIES the allegations contained in paragraphs "7", "8", "9", "10", and so much of "12" as alleges personal service of notice of lien upon defendant EIGHTEEN MILE CORPORATION.

FIRST AFFIRMATIVE DEFENSE

FOURTH: The cause of action alleged in the Complaint herein accrued on April 14, 1981, more than one year prior to the commencement of this action and is therefore barred.

Respondent's Appendix—Answer and Counterclaim of Respondent Eighteen Mile Corporation dated June 7, 1982.

SECOND AFFIRMATIVE DEFENSE AND SET-OFF

FIFTH: Plaintiff is indebted to defendant EIGHTEEN MILE CORPORATION in the sum of Five Thousand Four Hundred Thirteen and 16/100 Dollars ($5,413.16) together with interest from February 19, 1980, by virtue of a judgment entered on February 19, 1980, in the City Court of Buffalo, New York, wherein Herschel L. Reingold is judgment creditor and who assigned, for due consideration, said judgment to defendant EIGHTEEN MILE CORPORATION by instrument dated September 24, 1980 and filed with the Erie County Clerk on September 26, 1980. No part of said judgment has been paid.

THIRD AFFIRMATIVE DEFENSE AND COUNTERCLAIM

SIXTH: On April 14, 1981, the plaintiff herein filed a purported notice of mechanic's lien in the Office of the Clerk of the County of Erie, wherein and whereby he claimed a mechanic's lien in the amount of Nine Thousand Four Hundred Sixty-Two and 18/100 Dollars ($9,462.18) in the real property described in the complaint herein, for labor alleged to have been performed and materials alleged to have been furnished, such purported notice of lien being the same notice of lien alleged in paragraph "11" of the complaint, a photocopy of which is attached hereto.

SEVENTH: This defendant at the time of filing of such purported notice of lien was, and now is, the owner in fee simple of the real property described in the complaint, against which the lien therein referred to was claimed.

Respondent's Appendix—Answer and Counterclaim of Respondent Eighteen Mile Corporation dated June 7, 1982.

EIGHTH: In and by said purported notice of lien, and the statements and allegations therein contained, the plaintiff willfully exaggerated the amount for which he therein claimed a lien, as he well knew at the time he signed, verified and filed the same. To this defendant's knowledge, the reasonable value of all the services performed by the plaintiff and material furnished by him did not exceed the sum of $400.00. The balance of the alleged items of labor were not performed and the balance of the alleged materials were not delivered. The truth of this allegation was well known to the plaintiff at the same time and, having such knowledge, he deliberately, intentionally and willfully made, verified and filed the said purported notice of lien in the exaggerated amount of Nine Thousand Four Hundred Sixty-Two and 18/100 Dollars ($9,462.18).

NINTH: By reason of plaintiff's willfull exaggeration of the purported notice of lien, as aforesaid, the said purported lien so claimed is, by virtue of the provisions of Section 39 of the Lien Law, void and of no effect, and should be so declared, the the plaintiff should be barred from recovery thereon.

TENTH: By reason of the aforesaid willful exaggerations, this defendant has been damaged in a sum to be determined by this Court in accordance with Section 39a of the Lien Law of the State of New York.

FOURTH AFFIRMATIVE DEFENSE

ELEVENTH: Prior to the filing of the notice of lien alleged in the complaint herein, the plaintiff failed to complete the work required by his contract with this

defendant, had abandoned same and this defendant had paid to the plaintiff the sum of $400.00 in full payment for plaintiff's labor performed and material furnished to date of payment. At the time of the filing of the lien by plaintiff, there was not due from this defendant to the plaintiff any sum of money whatever.

FIFTH AFFIRMATIVE DEFENSE AND COUNTERCLAIM

TWELFTH: Heretofore and on or about April 5, 1980, one-half of this defendant's issued and outstanding common stock was owned by plaintiff and the other one-half was owned by C. RUSSELL KELLERAN, JR. A house had been constructed on the premises aforementioned by one Russell Barcelona, and was complete to the stage of installation of insulation. On behalf of this defendant, it was agreed by the two said shareholders that the plaintiff would attend to the completion of the house in the capacity of general contractor. He agreed to perform said work without pay but with reimbursement for materials purchased with his own funds. The other shareholder, knowing nothing of the construction industry, agreed to borrow the funds necessary to complete the house and to lend them to this defendant at his actual interest cost thereof, principal and interest to be paid back upon the sale of the house, and he agreed to keep the books of account. Plaintiff requested two payments of $200.00 each, which were duly paid to him and which were for alleged disbursements, which plaintiff refused to document. To the best of this defendant's knowledge, plaintiff performed no services for, and supplied no materials to,

this defendant, other than plaintiff's exchange of a dual window unit already installed in the house for a defective sliding glass door unit which plaintiff had in his storage.

THIRTEENTH: Plaintiff's failure to perform said services as general contractor has caused this defendant to incur additional costs for such services, has delayed the sale of the house with the attendant costs of interest, real property taxes, insurance, etc., which have cost this defendant the sum of $20,000.00 to date, and which expenses will continue until the house is sold.

SIXTH AFFIRMATIVE DEFENSE

FOURTEENTH: If plaintiff performed any services for, or supplied any materials to, this defendant at the aforementioned premises, the same were performed and/or supplied during the month of April, 1980.

FIFTEENTH: Plaintiff's lien was filed on April 14, 1981, with the Clerk of Erie County.

SIXTEENTH: Plaintiff's lien was untimely filed in that it was filed more than four months after plaintiff's performance of his work, if any, as general contractor, or his supplying of any materials.

WHEREFORE, defendant EIGHTEEN MILE CORPORATION demands:

1) Judgment against plaintiff dismissing the complaint, and awarding this defendant the costs and disbursements of this action.

2) Judgment declaring and adjudicating that the purported lien claimed by the plaintiff, and referenced in his complaint, is barred, void and of no effect, and vacating and setting aside the same;

Respondent's Appendix—Answer and Counterclaim of Respondent Eighteen Mile Corporation dated June 7, 1982.

3) If plaintiff shall be awarded a money judgment against this defendant, the balance of the amount of this defendant's judgment against plaintiff, together with interest thereon, shall be set-off against any sums adjudged to be due to the plaintiff;

4) Judgment against the plaintiff because of plaintiff's willful exaggeration of purported notice of lien in such amount as may be determined by the Court in accordance with Section 39a of the Lien Law of the State of New York.

5) Judgment against the plaintiff for breach of contract to render his services, to this defendant, in his capacity as general contractor.

Dated: Buffalo, New York
June 7, 1982

C. RUSSELL KELLERAN, JR.
Attorney for Defendant
Eighteen Mile Corporation
Office and P.O. Address
1010 Western Building
15 Court Street
Buffalo, New York 14202
Telephone: (716) 853-2415

To: LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
Attorneys for Plaintiff
Office and P.O. Address
One Niagara Square
Buffalo, New York 14202
Telephone: (716) 849-1333